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EXAMINER

WEINSTEIN, STEVEN L

ART UNIT

PAPER NUMBER

1761

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13

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/609016

Applicant(s)

OLSEN ET AL

Examiner

S. WEINSTEIN

Group Art Unit

1761

mk-13

— The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address —

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- ☐ Responsive to communication(s) filed on \_\_\_\_\_
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- ☒ Claim(s) 1-65 is/are pending in the application.
- Of the above claim(s) 44-59 is/are withdrawn from consideration.
- ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- ☒ Claim(s) 1-43, 60-65 is/are rejected.
- ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- ☐ Claim(s) \_\_\_\_\_ are subject to restriction or election requirement

## Application Papers

- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)-(d).
- ☐ All ☐ Some\* ☐ None of the:
  - ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_
  - ☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

\*Certified copies not received: \_\_\_\_\_

## Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 4,5,6,7,12 ☐ Interview Summary, PTO-413
- ☐ Notice of Reference(s) Cited, PTO-892 ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948 ☐ Other \_\_\_\_\_

Office Action Summary

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 1, 3, 4, 5, 7, 14, 15-17, 18-20, 21-29, 32, 35-37, 38-43 and 60-65 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ahad et al (6199346) in view of Brna et al (4,792,457) or vice versa, both further in view of Bogdan (5,855,939), Mayfield (5,853,778) and Chenn (Can. 223097).

In regard to claim 1, Ahad et al discloses a process for continuously preparing food portions consisting of two or more food items wrapped in a flexible film, comprising the steps of separately pumping each of the two or more food items to an extrusion location, extruding each of the food items and combining them into the food portion wherein the combined food items within the food portion retain their individual product identity, and wrapping the food portion within the flexible film and sealing each food portion within the wrapper. Claim 1 recites in the preamble that the food items are "different" food items. The specification does not appear to define the word "different". Ahad et al discloses that the food products will have "different" characteristics (col. 2, para 5). Thus, the food items are "different", and could be considered to be rejectable under 35 USC 102, anticipation. In any case, although a 35 USC 102 rejection would appear to be appropriate, the rejection would be made under 35 USC 103, obviousness. Thus, although Ahad et al appears to be readable on different foods, if one views this phrase to mean different types of foods and not just different characteristics, then the rejection is under 35

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USC103. Note that Ahad et al discloses various foods could be formed and wrapped including cheese, meat, margarine, peanut butter, and jelly etc. Ahad et al does not appear to specifically teach that the foods themselves can be mixed and matched, although Ahad et al does not have any teaching that they could not be so wrapped. In any case, Brna et al, who discloses pumping, extruding and wrapping food items, specifically and unequivocally teaches that in the process, other products may be combined to form composite slices (col. 4, para. 3). To modify Ahad et al, if necessary, and extrude and wrap two different types of foods for their composite effect would therefore have been obvious. Bogdan, Mayfield and Chenn are relied on as further evidence of packaged composite slices (albeit, formed in a different manner). In regard to claim 3, whether the products are composite or not, the products such as that of Ahad et al would be expected to permit manual removal while retaining textural and shape characteristics. In regard to claim 14, the shape of the nozzle is seen to have been an obvious matter of choice and an obvious function of the shape one chooses to impart to the product as it leaves the nozzle (which, it is noted, is not necessarily the final shape). In regard to claims 15-17, Ahad et al discloses that the components can be separated for a short time after extrusion (by providing spaced extruders). To provide a divider plate for such a purpose would have been obvious. In regard to claims 18-20, the number of slices sealed and wrapped per minute is seen to have been an obvious function of the conventional equipment employed.

Ahad et al discloses 680 slices/minute. In regard to claim 21, sensing mechanisms would inherently have to be used in the art taken as a whole to regulate weights otherwise non-uniformity and greater expense would occur. Similarly for claim 22. In regard to claim 23, the apparatus recited, flow meters, transducers and level sensors are all conventional apparatus in the

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art. Applicants are not obviously the inventors of these devices or the first to use them in food processing. In regard to claims 24, 25, 26, and 27, Ahad et al teaches heating to soften food for extruding, alternating stripped patterns adjacement extrusion nozzles and variegated formats, respectively. In regard to claim 28, since the art taken as a whole and particularly Ahad et al and Brna et al disclose the manipulative steps, then they would inherently be expected to share the same refrigerated shelf life. Note that although not claimed, the references disclose gas impermeable packages and extended shelf life. In regard to claim 29, both Ahad et al Brna et al teach cooling after extrusion. In regard to claim 30, the ingredients of the combination would obviously have to be mixed before extrusion. Claims 38-43 and 60-65 are rejected for the reasons given above in regard to claims 1.

Claims 2, 8, 9, 10-13, 30, 31, and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Tiemstra (3,969,514), Cooper et al (3,552,980) and Colby (3,278,314), and Lasdon et al (5,034,242).

Claim 2 recites that the water activity of at least one of the food items is modified by the addition of sugar. It is well established in the art that composite foods stay in their respective phase if the water activity between them is narrowed and that sugar is a common humectant, which binds water and thus lowers the water activity. It is noted, for example, if the composite products are a peanut butter and jelly, the jelly is high sugar content product. Tiemstra teaches lowering the water activity between composite foods such as nut spread and jelled fruit spread (or the fat content of the nut food should be raised). Tiemstra discloses, for example, lowering the jelled fruit component to a water activity to .55. Cooper lowers the viscosity of the jelled phase by adding carbohydrates as does Colby, whereas Lasdon discloses two water based

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compatible phases of a composite food. Thus, to modify the combination and alter the water activity if the composite foods are subject to intermingling would have been obvious. In regard to claim 8, to increase the water activity of the nut butter by adding a known water activity increasing agent to further avoid phase separation would have been obvious in view of the art taken as a whole. In regard to claim 9, Tiemstra teaches it would have been obvious to add hard fat to a butter phase of a two-component composite for applicants disclosed reason i.e. to prevent phase separation. In regard to claims 10-14, the particular conventional all ingredients and their concentrations are seen to have been an obvious routine determination. Note that ranges such as 0-10% peanut flour is construed as having no peanut flour. The art taken as a whole including Bogdan, Tiemstra, Cooper et al and Colby disclose various compositions employing conventional ingredients for both the jelled component and the nut component. In regard to claim 30 and 31, the particular hardness of the butter and jelly, which presumably is indicative of viscosity, is seen to have an obvious determination if indeed not already inherent in the art taken as a whole.

Claims 6 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references employed against claim 1, further in view of Kratochvil (US 5063073).

In regard to claim 6, the combination teaches packaging food products in flexible wrapping material wherein a multistage thickening composition of heat activated starch in combination with a protein, hydrocollid or protein/hydrocollid blend is used (see e.g. Brna et al column 3, lines 1-31, column 4, lines 60-69, claims 1 and 2). Brna et al. teach the starch is added to gel with free water and prevent syneresis (i.e. resulting in a more viscous composition). The starch has a gelling temperature less than the gel temperature of the protein, hydrocolloid or

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blend thereof, and is the first thickening agent. Furthermore, the starch is not the final texture of consistency of the product (Column 4, lines 13-59, column 11, lines 17-31). The starch would inherently be disrupted as the protein, hydrocolloid or blend thereof partially begins to thicken during the packaging step (column 9, line 16 to column 10, line 20, especially column 10, lines 12-15). Finally the second thickening agent, the protein, hydrocolloid or blend thereof, increase in viscosity as the temperature increases and further disrupts the first thickening agent to provide the desired texture shape and consistency (column 12, lines 32-55, column 13, lines 6-68).

Although, Brna et al teach the food product has an initial viscous texture at filling and the final texture is more viscous, Brna et al are silent in teaching the food product has an initial viscosity of 5000 cp and a viscosity of 100,000 or greater after either agents have gelled.

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Kratochvil teaches a food product comprising a two agent thickening system that is extruded into slices and hermetically sealed (column 10, lines 18-41). Kratochvil teaches making slices using an extruding, wrapping method as taught by Brna et al. (column 5, lines 19-68). Kratochvil is relied on as further evidence of the conventional initial and final viscosities for wrapped slices. Kratochvil teach these food products can have viscosities anywhere from 9900 to 2,400,000 prior to packaging, or at fill (column 12, lines 26-65, including Tales). Additionally, Kratochvil teaches raising the temperature of the product for full hydration or gelling of a thickening agent (column 8, lines 47-50). Therefore, it would have been obvious to modify the combination to have an initial fill viscosity of 5000 cps since it was well known in the art that the conventional fill viscosity of food slices are anywhere from 900-2,400,000 cps. It would have been obvious that the viscosity would have further increased to at least 100,000 after either gelling agent gelled since Kratochvil teaches gelling after the initial fill viscosity of 900 to 2,400,000 cop would only increase the viscosity further. Additionally, the viscosity measurement would have been dependent on the type of equipment used to measure the value and temperature at which it was measured.

Any inquiry concerning this communication from the examiner should be directed to Steven Weinstein whose telephone number is 703 308-0650. The examiner can generally be reached on Monday-Friday from 7:00 a.m. to 3:30 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703 308-3959. The fax phone numbers for the organization where this application is assigned are 703-872-9310 for regular communications and 703 872-9311 for After Final communications.



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Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is 703 305-0661.

Examiner Weinstein/g

July 29, 2002

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EVE WEINSTEIN  
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